No. 84-1988

Supreme Court, U.S.
FILED
JUL 24 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY R. SCHUBERT, PETITIONER

v.

RICHARDSON SECURITIES OF CANADA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

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Petitioner contends that he may recover damages against the Commodity Futures Trading Commission under the Federal Tort Claims Act on account of the Commission's alleged failure to protect the public interest.

1. Petitioner brought this action in the United States District Court for the Southern District of New York against the Commodity Futures Trading Commission and others, seeking more than $300,000 in damages in connection with transactions in gold futures contracts that Richardson Securities of Canada (RSC) had executed on the Commodity Exchange for petitioner's account. He alleged in a second amended complaint that RSC failed to execute his instructions properly by selling his futures contracts prematurely, causing him to lose money. The Commission, petitioner claimed, contributed to his loss by failing to require commodity exchanges to formulate and enforce adequate

standards of ethical practice and by failing to enforce certain ethical standards for commodity brokers.

The district court dismissed the action against the Commission for lack of subject matter jurisdiction because sovereign immunity has not been waived to permit a suit for damages against the Commission (C.A. App. 17-20).[1] The district court also dismissed the action against the Commodity Exchange and a subsidiary of RSC and various individuals, but denied RSC's motion to dismiss for want of jurisdiction pending discovery (*id.* at 11-23).[2] The court later denied petitioner leave to amend his complaint for a third time, reasoning that the amendment would prejudice RSC and cause undue delay, and that petitioner had failed to specify the nature of the additional relief he sought to add to his complaint (*id.* at 29, 35 n.1).[3] Following a bench trial, the district court entered judgment in favor of RSC (*id.* at 39-48).

The court of appeals affirmed in an unpublished judgment order (Pet. App. A1-A5; 762 F.2d 991 (Table)). The court of appeals held (Pet. App. A4) that petitioner's claim against the Commission was barred by sovereign immunity and that the district court did not abuse its discretion in denying petitioner leave to file a third amended complaint.

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[1]The district court's opinion is reproduced only in part at Pet. App. A6-A14. It is reproduced in full at C.A. App. 11-23. A later opinion of the district court partially reproduced at Pet. App. A14-A18 may be found at C.A. App. 24-35. An opinion of the district court not reproduced in petitioner's appendix is at C.A. App. 36-38. Finally, the district court's findings of fact and conclusions of law, which are partially set forth at Pet. App. A19-A23, are reproduced in full at C.A. App. 39-48.

[2]The district court ultimately concluded that it had personal jurisdiction over RSC (C.A. App. 26-28).

[3]Petitioner's attempt to renew his motion without offering new supporting grounds was also denied (C.A. App. 36-38).

2. The decision of the court of appeals is plainly correct and does not conflict with the decisions of this Court or any other court of appeals. Further review is therefore unwarranted.

It goes without saying that, in the absence of a waiver of sovereign immunity, the Commission may no more be sued for damages than the United States itself. See, *e.g.*, *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 733-734 (1982). Petitioner contends (Pet. 25-27) that the government has waived sovereign immunity to his damages action in the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq*. This argument is utterly without merit. In the first place, the Commission is not a proper party to a suit under the Act. 28 U.S.C. 2679(a). Moreover, petitioner failed to exhaust his administrative remedies by presenting his claim to the Commission, a jurisdictional prerequisite to the Act's waiver of sovereign immunity. 28 U.S.C. 2675(a). Finally, petitioner's contention that the Commission failed adequately to regulate commodity brokers falls squarely within the discretionary function exception in the Act. 28 U.S.C. 2680(a); see *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984), slip op. 15 (footnote omitted) ("whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals").[4] For these reasons, petitioner's claim for damages against the Commission was properly dismissed.[5]

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[4]Petitioner's reliance (Pet. 27) on *Hatahley* v. *United States*, 351 U.S. 173 (1956), is misplaced. There, government agents had committed trespasses in violation of state law — no discretionary functions involving the scope of an enforcement program were at stake (*id.* at 181).

[5]In any event, petitioner's argument (Pet. 26) that the Commission "[a]s a matter of policy * * * does not enforce" the public interest requirement set forth in Section 5 of the Commodity Exchange Act, 7

Petitioner's factbound contention (Pet. 28-34) that he should have been allowed to amend his complaint for a third time obviously does not warrant review by this Court. The district court's ruling was well within its discretion, especially in view of petitioner's failure to come forward with pleadings that would have cured the various defects in his complaint. See, *e.g.*, *Cape Cod Nursing Home Council* v. *Rambling Rose Rest Home*, 667 F.2d 238, 242 n.5 (1st Cir. 1981) (leave to amend properly denied where amendment would be futile).

U.S.C. 7, is erroneous. The Commission is authorized under Section 5(g) to designate an exchange as a contract market for the trading of futures contracts when the exchange demonstrates that the proposed trading "will not be contrary to the public interest." The Commission enforces the public interest requirement in the contract market designation process and through periodic exchange reviews. See 17 C.F.R. 1.41, 1.50-1.54; *Guideline on Economic and Public Interest Requirements for Contract Market Designation*, 47 Fed. Reg. 49832 (1982); 40 Fed. Reg. 25849 (1975); *Guideline on Contract Market Rule Enforcement Program*, 1975 Comm. Fut. L. Rep. (CCH) ¶ 6430; CFTC Ann. Rep. 78-80 (1984). The Commission's December 23, 1976 notice of adoption of Rule 155.3, 17 C.F.R. 155.3 (41 Fed. Reg. 56134), cited by petitioner (Pet. 22, 23, 26), does not support his argument. Rule 155.3 established minimum safeguards directly on all futures commission merchants, rather than on exchanges, because of inadequacies at the time in the enforcement programs of many exchanges. In light of its rule, the Commission found it unnecessary to require exchanges to adopt similar requirements. 41 Fed. Reg. 56138 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1985

DOJ-1985-07